



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 12, 1993

Mr. Steve C. Copenhaver  
Attorney for Karnes City I.S.D.  
Walsh, Judge, Anderson,  
Underwood & Schulze, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR93-169

Dear Mr. Copenhaver:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 18705.

The Karnes City Independent School District (the "school district") has received a request for information in the personnel file of one of the school district's teachers. Specifically, the requestor seeks "any reprimand or other action by the [school district], or any official thereof" concerning the teacher in question. You have submitted a reprimand letter to a specific teacher, a letter grieving the reprimand from the teacher, and a response letter to the teacher's grievance letter. You claim the information is excepted under sections 3(a)(2), 3(a)(3), and 3(a)(11) of the Open Records Act.

Section 3(a)(2) excepts

information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, and transcripts of professional public school employees; provided, however, that nothing in this section shall be construed to exempt from disclosure the degree obtained and the curriculum on such transcripts of professional public school employees, and further provided that all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under this Act.

Information may be withheld under section 3(a)(2) only if it meets the test under section 3(a)(1) for privacy. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision No. 545 (1990) at 2. Under that test, information may be withheld from disclosure if

(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

*Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Employee evaluations generally do not satisfy these criteria. Open Records Decision No. 473 (1987) at 3. A poor evaluation is not a "highly intimate or embarrassing fact about the employee's personal affairs. Moreover, the public has a legitimate interest in the job performance of public employees." *Id.* This reasoning applies with equal force to a reprimand. Accordingly, you may not withhold the requested information under section 3(a)(2).

Section 3(a)(3) excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Information must relate to litigation that is pending or reasonably anticipated to be excepted under section 3(a)(3). *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Section 3(a)(3) protects a governmental body from compromising its position in litigation by preventing discovery procedures from being circumvented. Open Records Decision No. 349 (1982) at 2. However, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 3(a)(3) interest exists. *Id.*; Open Records Decision No. 320 (1982).

You contend that there is a likelihood of litigation because the teacher may file a grievance before the school board. The documents you submitted consist of letters to or from the teacher involved. Obviously, the teacher has seen all of the information in the letters. Subsequently, there is no basis for withholding that information from the requestor pursuant to section 3(a)(3).

You also claim that the information constitutes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency" under section 3(a)(11) of the act and, therefore, is excepted from public disclosure. For several months now, the effect of the section 3(a)(11) exception has been

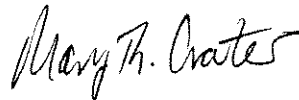
the focus of litigation. In *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), the Third Court of Appeals recently held that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." *Gilbreath*, 842 S.W.2d at 413. The court has since denied a motion for rehearing this case.

We are currently reviewing the status of the section 3(a)(11) exception in light of the *Gilbreath* decision. In the meantime, we are returning your request to you and asking that you once again review the information and your initial decision to seek closure of this information. We remind you that it is within the discretion of governmental bodies to release information that may be covered by section 3(a)(11). If, as a result of your review, you still desire to seek closure of the information, you must re-submit your request and the documents at issue, along with your arguments for withholding the information pursuant to section 3(a)(11) or any other exception that you have previously raised. You must submit these materials within 15 days of the date of this letter. This office will then review your request in accordance with the *Gilbreath* decision. If you do not timely resubmit the request, we will presume that you have released this information.

Finally, we note that the letters you submitted for our review make reference to two students. You have failed to raise two important exceptions under the Open Records Act. Any identifying information concerning the students is protected under section 3(a)(14) and section 14(e) which incorporates the Family Educational Rights and Privacy Act of 1974, section 1232g of title 20 of the United States Code.<sup>1</sup> See Open Records Decision No. 332 (1982) (information should be deleted to the extent reasonable and necessary to avoid identifying students). We have marked the portions of the letters that must be withheld in order to protect the students' identities.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-169.

Yours very truly,



Mary R. Crouter  
Assistant Attorney General  
Opinion Committee

MRC/LBC/le

Ref.: ID# 18705

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<sup>1</sup>Because a governmental body cannot waive exceptions which protect privacy rights of third parties, we raise these exceptions for you. See Open Records Decision No. 473 (1987).

Enclosures: Marked documents

cc: Mr. James M. Whitten, Attorney  
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(w/o enclosures)